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In the Supreme Court of the United States

1967

DEOLA FISHER, SR., PETITIONER

VS.

STATE OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR PETITIONER

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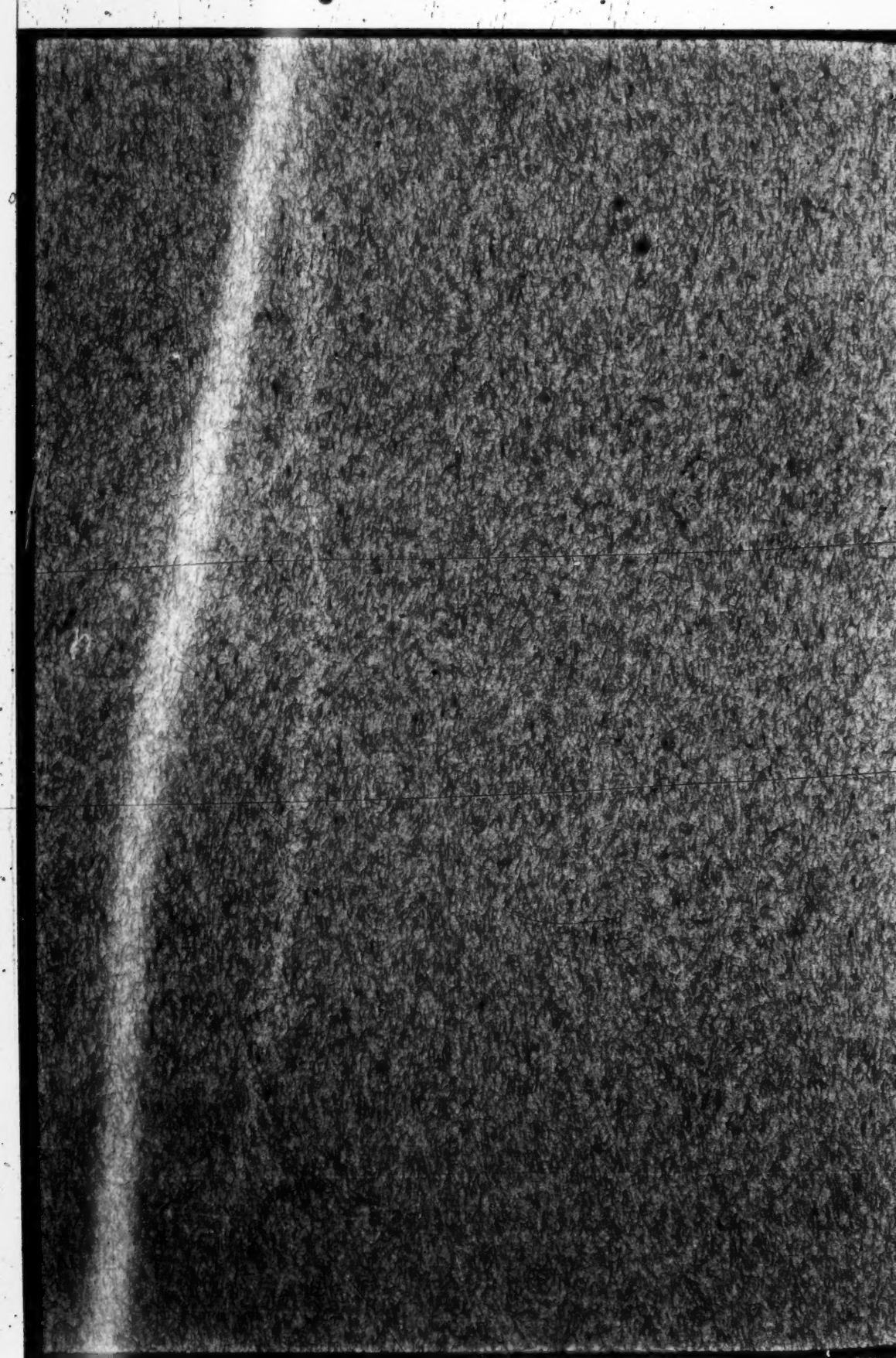
Deola Fisher



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In the Supreme Court of the United States

DEOLA FISHER, SR., PETITIONER

VS.

STATE OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR PETITIONER

The opinion of the Supreme Court of Arkansas is attached hereto and appears as *Deola Fisher, Sr.* v. *State of Arkansas,* 241 Ark. 545. The judgment was entered February 21, 1966, and a rehearing was denied without opinion. Jurisdiction to review this judgment by writ of certiorari is conferred pursuant to 28 U.S.C. Sec. 1257 (3), the Petitioner herein claiming under the Constitution of the United States a deprivation of his rights without due process of law.

Petitioner presents three questions for review.

1. Whether the Court erred in permitting Police Chief James Steed to testify over defendant's objection to statements made by defendant after his arrest without advising the accused of his constitutional rights to remain silent and to have an attorney prior to questioning, when he was questioned only after he had been arrested?

2. Whether the Court, in permitting former County Judge Charles O. Smithers, employer of deceased, to remain seated immediately behind the witness box during the time the witnesses were testifying after Judge Smithers had publicly expressed an opinion to the effect that, "It was a case of the worst negro on the hill killing the best negro on the hill," prevented defendant of a fair trial as guaranteed by the Constitution of the United States?

3. Whether the injection of the racial issue by the Prosecuting Attorney on voir dire and by the Deputy Prosecuting Attorney on closing argument prevented defendant of a fair and impartial trial without prejudice because defendant is of the negro race?

Petitioner contends that he did not receive a fair trial; that this case involves the due process claim of the Fourteenth Amendment of the Constitution of the United States. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Deola Fisher, Sr. was charged and tried for murder in the first degree for the killing of Peter Collier by shooting him with a pistol. He was convicted of murder in the second degree and punishment was fixed at fifteen years in the penitentiary.

The evidence at the trial reflects that Police Chief James Steed placed the petitioner under arrest and then began to question him with reference to why he shot the deceased. It was established by the testimony at the trial court that the accused was not advised of his constitutional rights to remain silent and to have an attorney prior to questioning (Tr. 253) and that he was questioned only after he had been arrested. At the trial, defense counsel *objected to the testimony* offered by Police Chief James Steed (Tr. 251-257) and moved that the testimony and evidence be suppressed. The motion was denied. On appeal, defendant

raised the issue by assignment of error and requested a new trial, which was denied.

During the course of the trial, the trial Judge permitted former County Judge Charles O. Smithers, employer of the deceased, Peter Collier, to remain seated immediately behind the witness box during the time the witnesses were testifying (Tr. 441). It was established in the chambers of the trial Judge that Judge Smithers had publicly expressed an opinion about the case and was interested in the outcome of the case because Deola Fisher had killed an employee of his (Tr. 440-442). Defense counsel objected to former County Judge Smithers being seated behind the witness box and moved for a mistrial, which was denied. On appeal, the question was raised by assignment of error asking for a new trial, which was denied.

During voir dire (Tr. 65-68), the Prosecuting Attorney asked a prospective juror if he felt that members of the colored race should answer to the law just the same as the white race and if the juror thought race should enter into it. On the face of the questions, it appeared that the questions were for the purpose of eliminating prejudice, but it was used and calculated for the purpose of injecting racial prejudice in an attempt to prepare the jurors for a maximum verdict because of the accused's race. Also, on closing argument, the Deputy Prosecuting Attorney stated that there had never in the history of Saline County been a negro convicted and receive a life sentence (Tr. 532-533). Defense counsel objected to those statements (Tr. 532) and moved for a mistrial. The trial court denied the mistrial. On appeal, the question was raised as an assignment of error with a request for a new trial, which was denied.

Petitioner contends that the Supreme Court of the State of Arkansas has decided this case in a way probably not in accord with applicable decisions of this Court.

Police Chief James Steed placed the defendant under arrest and then began to question him with reference to why he shot the deceased. It was established by testimony at the trial that the accused was not advised of his constitutional rights to remain silent and to have an attorney prior to questioning. It is submitted that any statement taken from an accused while he is in the custody of an officer is presumed to be involuntary and the burden of proving that it was voluntary is on the State. That no warning having been given by the officer of the rights of the accused to remain silent, that anything he said might be used against him and his right to counsel, together with the fact that this was a situation involving a negro citizen of the community being asked to answer a question by the Chief of Police during the night time necessarily implies coercion and since this testimony was admitted in evidence, there was a violation of the accused's constitutional rights and he did not receive a fair trial. *Escobedo* v. *Illinois*, 378 U. S. 478.

During the trial, former County Judge Smithers was permitted, over defendant's objection, by the trial court, to remain seated not in the place reserved for spectators but behind the witness box. Judge Smithers was the employer of the deceased, Peter Collier, and it was known that he had a personal interest in the outcome of the case. The Prosecuting Attorney emphasized that deceased had worked for Judge Smithers and made reference to that fact in opening statement and closing statement. The record shows that he conversed and visited with a number of jurors during a recess. His interest in the case was known to the jurors and to the Court. It was established in chambers, not in the presence of the jury, that Judge Smithers had publicly expressed an opinion about the case that, "It was a case of the worst negro on the hill killing the best negro on the hill." All of this reveals a strenuous effort to impress upon the jury that Judge Smithers was interested in the outcome of this case against the petitioner who had

killed an employee of his. It was highly prejudicial to the petitioner for the Court to permit Judge Smithers to be seated outside the spectator area in a chair immediately behind the witness box. This part of the courtroom is normally reserved for the Judge, the jury, the lawyers, the witnesses and other court officials; however, the Trial Court did not require him to remove himself from this area. It is earnestly submitted that this conduct deprived petitioner of a fair trial. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits and to confer privately with client and co-counsel. *Sheppard* v. *Maxwell,* 86 S. Ct. 1507 (1966). This Court has insisted that no one be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. *Chambers* v. *State of Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716. Mr. Justice Holmes stated in *Patterson* v. *State of Colorado ex. rel. Attorney General,* 205 N. S. 454, 27 S. Ct. 556, 51 L. Ed. 879, that, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." A jury's verdict should be based on evidence received in open court, not from outside sources and influence.

During voir dire, the Prosecuting Attorney asked a prospective juror if he felt that a member of the colored race should answer to the law just the same as the white race and if the juror thought race should enter into it. These questions were used for the purpose of injecting racial prejudice in an attempt to prepare the jurors for a maximum verdict because of race. Also, in closing argument, the Deputy Prosecuting Attorney stated that there had never yet in the history of Saline County been a conviction where a negro, a member of the negro race received a life sentence. These statements were used to prejudice

the minds of the jurors and prevented petitioner of a fair and impartial trial. Our system of law has always endeavored to prevent even the probability of unfairness. *In re Murchison*, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942.

For these reasons, Petitioner earnestly pleads that he did not receive a fair and impartial trial and prays that a writ of certiorari will be granted.

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O. WENDELL HALL, JR.

Attorneys for Petitioner,
Deola Fisher

By: FLETCHER JACKSON

APPENDIX

SUPREME COURT OF ARKANSAS

No. 5220

Opinion Delivered

DEOLA FISHER, SR., Appellant

v.

STATE OF ARKANSAS, Appellee

APPEAL FROM CIRCUIT COURT OF SALINE COUNTY

Affirmed

PAUL WARD, Associate Justice

Appellant, Deola Fisher, Sr. was charged and tried for murder in the first degree for the killing of Peter Collier by shooting him with a pistol. The jury returned a verdict of murder in the second degree and fixed the punishment at fifteen years in the penitentiary.

Collier was shot about seven p.m. while he was standing in front of a cafe in Benton. Nearby witnesses saw the shooting. Collier was rushed to a hospital where he later died. Appellant makes no contention here that there is any insufficiency of evidence to sustain the conviction for murder in the second degree.

On appeal, appellant argues fourteen separate points for a reversal, however, we find that all issues raised can be more conveniently and just as adequately treated under the eight subdivisions hereafter discussed.

One. We find no reversible error in the trial court's failure to continue the trial. Appellant was charged on

November 5, 1965, and the trial was set for December 7, 1965. On Motion of appellant the case was continued until January 3, 1966, but on December 27, 1965 appellant asked for a continuance until March 29, 1966 (the beginning of the next term of court). This request was denied, but the court did grant a continuance until February 14.

The granting of a continuance is largely in the discretion of the trial court, as we have frequently held. We are unable to say the court abused its discretion in this instance. The only specific cause urged by appellant for a continuance was "that one eye witness, Robert Higgs, who was probably closer to the scene of the encounter than anyone else was absent . . . " although he had been subpoenaed. However, no showing is made as to what the absent witness' testimony would have been or whether it would be corroborative, as is required under our decisions. *Gallaher* v. *State,* 78 Ark. 299, 95 S. W. 463 and *Caldwell* v. *State,* 214 Ark. 287, 215 S. W. 2d 517. The record here discloses that the absent witness was only one of several who saw the shooting.

Two. During the trial appellant, on six separate occasions, asked for a mistrial, and each time the request was denied by the court. These are alleged to constitute reversible error, but we do not agree.

(a) At the beginning of the trial and in preparing to select the jurors, the judge asked the members of the special panel if there was any reason why they could not serve. He then said it would be to their benefit to serve because they would be excused from jury service for the next two years. It appears the judge was in error in the last statement, but even so we see no possible prejudice resulting to appellant, and none is pointed out by appellant.

(b) On *voir dire* examination of the jurors the court stated that both the deceased and appellant were members

of the Negro race, and then the prospective jurors were asked if they knew of any reason why they could not give the defendant a fair trial. Their answer was in the negative. It appears to us that this information would tend to help and not to hurt appellant because the jury was certain to know he was of the Negro race.

(c) The Prosecuting Attorney asked one of his witnesses a question, and the answer received was a "surprise." Then the witness was asked: "Do you remember telling me anything different from that, John?" The District Attorney then stated: "Your Honor, I am surprised. This witness has made a different statement to me," but the trial court refused to allow the matter to proceed further. In the first place, since the witness appeared hostile, we think it would have been proper to allow further questioning. *Ray* v. *State,* 102 Ark. ___, 145 S. W. 190, and *Shands* v. *State,* 118 Ark. 460, 177 S. W. 18. Also, we think the matter tended to help rather than hurt appellant.

(d) During the closing argument of the State's Attorney he mentioned the fact that never before in that county had a member of the Negro race, upon conviction, received a life sentence. At that instant appellant moved for a mistrial, which was refused, and the court was not asked to admonish the jury. It is well settled by many decisions of this Court that the trial judge is vested with wide discretion in determining the propriety of counsel's remarks to the jury: *Greene* v. *State,* 38 Ark. 304; *Lemiels* v. *State,* 113 Ark. 598, 166 S. W. 741; *Head* v. *State,* 221 Ark. 213, 252 S. W. 2d 617. Moreover, the verdict shows the jury was not persuaded by the remarks.

We have examined other contentions by appellant that a mistrial should have been granted, but find no reversible error in any of them.

Three. Appellant challenged two jurors for cause, but was refused by the trial court. The only basis for the chal-

lenge was that these jurors were employed at the same place where the deceased was employed. It is admitted by appellant that no actual prejudice was shown, and we think none was indicated.

Four. In preparing its case the State took a statement from one of its witnesses whose name was on the information. Appellant requested the trial court to compel the State to turn the statement over to him. The court refused the request, and we think properly so. In the case of *Edens* v. *State,* 235 Ark. 178, 359 S. W. 2d 432, this same issue arose and we said:

> " . . . The defendant was not entitled to receive copies of the statements that the prosecuting attorney had obtained from the various witnesses for the State, as this was a part of the prosecuting attorney's work papers . . . "

Five. At the trial the Chief of Police was allowed, over the objections of appellant, to testify concerning a certain statement appellant had made to him after the arrest was made. At the time of the arrest the officer asked appellant why he killed the deceased, and the prompt reply was that he needed killing. It is not contended any force, promise or persuasion was used to induce appellant to talk, but it is contended that the error consists in the failure to show appellant was first advised of his constitutional rights —such as to keep silent and to be represented by an attorney.

We think no reversible error has been shown, based on our holding in the case of *Turney* v. *State,* 239 Ark. 851, 395 S. W. 2d 1. In that case (as shown at page 854 of the Ark. Reps.) the arresting officer asked the accused why he would get involved "in something like this," and the accused promptly replied he didn't know and that he must have been out of his mind. In holding the officer's testi-

mony regarding that incident was proper, we said: "The simple statement, above quoted, was responded to by the spontaneous admission of guilt by Turney."

We also point out this case was tried in February, 1966 and therefore is not controlled by the *Escobedo* case which did not (according to *Johnson* v. *New Jersey*, 384 U. S. 719) become applicable to cases tried before June 13, 1966.

Six. Appellant contends it was reversible error for the trial court to allow the former employer of the deceased to sit behind the witness stand. Appellant makes no attempt to show any actual or suspected prejudice against him. This was a matter which addressed itself to the sound discretion of the trial court, and we cannot say he abused such discretion in this instance. In fact it was not known that he would be a witness until he was called by appellant to testify.

Seven. Reversible error is predicated on the failure of the trial court to give an instruction on manslaughter. It is true the court refused one such instruction, but this was not error because the court had already given instruction No. 2 on manslaughter, as requested by appellant.

Eight. Finally it is urged that the trial court erred in limiting, in time, the argument of one of appellee's counsel, but again we cannot agree. Here is substantially what occurred during the argument:

> "The Court: Mr. Boswell, how much longer do you propose to argue?
>
> "Mr. Boswell: I didn't know the Court had put a time limit on argument.
>
> "The Court: I didn't put a time limit on it. I am going to give your associate time to argue in the morning. It is after five o'clock. We are going to finish with yours this afternoon if we stay til nine o'clock."

Due to the lateness of the hour, we think the court's question was pertinent.

Finding no reversible error, the judgment is affirmed.

Affirmed.

12-28-66 Petition for Rehearing filed.
1-16-67 Petition denied.

A. Douglas Fairley, D.C.

STATE OF ARKANSAS
IN THE SUPREME COURT

I, Jimmy H. Hawkins, do hereby certify that the foregoing Seven pages of photostated material is the true copy of the opinion in the case of Deola Fisher, Sr. v. State of Arkansas.

Witness my hand and seal this 16th day of March, 1967.

Jimmy H. Hawkins, Clerk

By: A. Douglas Fairley, D.C.

FILED
JUN 7 1967
JOHN DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 150

1967

DECLA FISHER, SR., *Petitioner,*

v.

STATE OF ARKANSAS, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

No._____

DEOLA FISHER, SR., _____ *Petitioner,*

v.

STATE OF ARKANSAS, _____ *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below of the Arkansas Supreme Court appears as Deola Fisher, Sr. v. State of Arkansas, 241 Ark. 545 (December 5, 1966). The petition for rehearing was denied by the Supreme Court of Arkansas on January 16, 1967.

JURISDICTION

The petitioner has alleged jurisdiction under 28 U.S.C. §1257 (3). Respondent submits that this Court should not take jurisdiction in this matter for the reasons pointed out in respondent's argument.

STATEMENT OF THE CASE

Although not in issue here, a brief review of the legal history of this litigation is extremely beneficial and should aid in the consideration of petitioner's application for certiorari.

An information was filed against the petitioner, Deola Fisher, Sr., on November 8, 1965, charging him with first degree murder in that the defendant on the 5th day of November, 1965, did unlawfully, feloniously, with deliberation and premeditation wilfully and maliciously shoot, kill and murder Peter Collier by shooting him with a pistol. On November 10, 1965, appellant was arraigned, entered his plea of not guilty and bail was set in the amount of ten thousand dollars. Thereafter bail was reduced to the sum of five thousand dollars. The defendant was tried on the 14th day of February, 1966, and the jury returned a verdict of guilty of murder in the second degree and fixed his punishment at 15 years in the penitentiary. Judgment was entered on the 21st day of February, 1966, sentencing the defendant to a term of 15 years in the State Penitentiary. In due time a motion for new trial was filed. The motion for new trial was overruled and the case was appealed to the Supreme Court of Arkansas. From the decision of the Supreme Court of Arkansas affirming the conviction this petition for writ of certiorari arises.

The issues noted in the petition for writ of certiorari are identical to those presented to the Supreme Court of the State of Arkansas, and these three issues were briefed and decided by the Supreme Court of the State of Arkansas.

The petitioner raises one issue in this petition for writ of certorari which is based on three instances which occurred during the course of the trial. The issue raised is whether or not petitioner received a fair trial pursuant to the Constitution of the United States and more specifically to the Fourteenth Amendment to the Constitution of the United States.

The three questions raised in support of petitioner's contention are:

1. Whether the Court erred in permitting Police Chief James Steed to testify over defendant's objection to statements made by the defendant after his arrest without advising the accused of his constitutional rights to remain silent and to have an attorney;

2. Whether the Court erred in permitting former County Judge Charles O. Smithers, employer of the deceased, to remain seated immediately behind the witness box during the time the witnesses were testifying after Judge Smithers had expressed his opinion of the character of the petitioner and his guilt;

3. Whether the notation by the prosecuting attorney and his deputy of the deceased's and petitioner's race, both were Negroes, prevented the petitioner a fair and impartial trial without prejudice.

ARGUMENT

I

The petitioner was afforded a fair and impartial trial which was conducted pursuant to the Constitution of the United States and more specifically pursuant to the Fourteenth Amendment to the Constitution of the United States. Petitioner was afforded due process of law.

For simplicity respondent's argument on this point is divided into three different categories in accordance with the order of the petitioner's brief.

(a) *The petitioner was not denied due process of law when the court permitted Police Chief James Steed to testify to statements made spontaneously before petitioner was advised of his constitutional rights to remain silent and to have an attorney.*

The trial Court permitted Police Chief James Steed to testify to a statement made by the defendant at the time of his arrest. Petitioner argues that this testimony should not have been permitted because the defendant had not previously been warned of his right to remain silent and of his right to retain counsel. In support of this proposition the petitioner relies on *Escobedo* v. *Illinois,* 378 U.S. 478 (1964).

Police Chief James Steed testified that he asked the petitioner why he had killed the deceased, and the petitioner promptly replied that he (deceased) needed killing. In the petitioner's petition for writ of certiorari he does not allege any force, promise or persuasion was used to induce him to talk but simply states that this statement

should not be admitted because petitioner was not first advised of his constitutional rights to remain silent and to be represented by an attorney. Respondent agrees with the Supreme Court of the State of Arkansas that this was a spontaneous admission of guilt by petitioner in that the Police Chief only asked a question to which the petitioner spontaneously replied shortly after the arrest.

In any event, petitioner is incorrect in relying on the case of *Escobedo* v. *Illinois, supra,* or *Miranda* v. *United States,* 384 U.S. 436 (1966), as being applicable because these decisions do not apply to cases tried before June 13, 1966, according to *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). The instant case was tried in February of 1966; therefore, it is respondent's contention that the only requirement was that the admission had been made voluntarily and not as a result of coercion. The record demonstrates beyond doubt that the confession was voluntarily and spontaneously made, and therefore the petitioner was not denied due process of law under the Fourteenth Amendment to the United States Constitution.

(b) *The petitioner was not denied due process of law under the Fourteenth Amendment to the United States Constitution when the court permitted former County Judge Charles O. Smithers, employer of the deceased, to remain seated in the section ordinarily reserved for lawyers, the defendant, the judge, the jury and court officials.*

Petitioner makes no attempt to show any actual or suspected prejudice arose against him by allowing Charles O. Smithers to sit in the area ordinarily reserved for the lawyers, the defendant, the judge, the jury and court

officials in his petition for writ of certiorari. It was established in chambers but not in the presence of the jury that Charles O. Smithers had an opinion about the case but petitioner does not at any point suggest that Judge Smithers ever expressed this opinion in the presence of the jury, and therefore no statement that he made during the course of the trial out of the hearing of the jury could in any way prejudice the petitioner. Petitioner cites *Sheppard* v. *Maxwell,* 86 S.Ct. 1507 (1966) as authority for this contention. The *Sheppard case* is easily distinguishable in that the presence of the spectators was prejudicial to Sheppard, and in the instant case there is no allegation of prejudice to the petitioner. It is clear that the trial was conducted fairly in a public tribunal free of prejudice, passion, excitement and tyrannical power pursuant to *Chambers* v. *State of Florida,* 309 U.S. 227 (1940), and that Charles O. Smithers' presence in no way affected the trial. In fact, it was not known that Charles O. Smithers would be a witness until he was called by the State to testify.

Petitioner was not denied due process of law pursuant to the Fourteenth Amendment to the Constitution of the United States because of Charles O. Smithers' presence.

(c) *The petitioner was not denied a fair trial and due process of law under the Fourteenth Amendment to the Constitution of the United States when the race of the petitioner was mentioned on voir dire by the prosecuting attorney and in the closing argument by the deputy prosecuting attorney.*

During the voir dire (T.65-68) the prosecuting attorney asked a prospective juror if he felt that members of the colored race should answer to the law just the

same as the white race and if the jurors thought race should enter into it. Clearly a question of this sort points out that the prosecuting attorney was attempting to comply with the Constitutions of the United States and of the State of Arkansas by eliminating prejudice on the part of any juror. It appears to respondent that this information would tend to help and not hurt the petitioner because the jury was certain to know he was of the Negro race. Petitioner's argument not only assumes without foundation that the jury was prejudiced by the remarks but it contends the incredible premise that the jury, without the comments, would have remained ignorant during the full course of this lengthy trial of the fact that the deceased and the petitioner were both Negroes. The petitioner does not claim that the jury was biased or prejudiced or that it was chosen in violation of his constitutional rights but only alleges that this question that was intended to assure a prejudice-free trial denied the petitioner a fair trial.

Respondent contends that this question assured a fair and impartial trial, and therefore petitioner was not denied due process of law under the Fourteenth Amendment to the Constitution to the United States by the respondent's question.

Further, the petitioner alleges that the remarks of the deputy prosecuting attorney during closing argument concerning the fact that there had never, in the history of Saline County, been a Negro convicted and sentenced to life imprisonment was prejudicial to the petitioner and in violation of due process of law. It is well settled that the trial judge is vested with wide discretion in determining the propriety of counsel's remarks to the jury. *Green* v. *State*, 38 Ark. 304 (1881); *Head* v. *State*, 221 Ark. 213, 252 S.W. 2d 617 (1952). It is obvious that

the statement had no bearing on the jury because the petitioner was convicted of second degree murder and sentenced to 15 years. This comment was not made to prejudice the minds of the jurors and prevent the petitioner a fair and impartial trial, and it is the contention of the respondent that no prejudice arose from the statement as shown by the jury's verdict and further it is respondent's position that the statement is constitutionally permissible. The petitioner was not denied due process of law by the statement of the deputy prosecuting attorney in his closing argument.

CONCLUSION

It is submitted that the issue raised by the petitioner in his petition for writ of certiorari is totally without merit for the foregoing reasons and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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